Dato' V Kanagalingam v David Samuels & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3(S7)–22–56 OF 1996
MOHD HISHAMUDIN J
1 SEPTEMBER 2006

Civil Procedure — Pleadings — Defamation — Plaintiff pleaded the whole article — Whether pleading defective

Constitutional Law — Courts — Federal Court — Composition of Federal Court — Whether High Court judge legally competent to sit on a Federal Court panel — Federal Constitution art 122(2)

Tort — Defamation — Libel — Publication in a magazine — Caricature on the front cover — Whether interpretation or understanding of the caricature supported his allegation

This is a defamation suit by the plaintiff, an advocate and solicitor, against the defendants for libel. The plaintiff claims damages in the sum of RM100 million including aggravated and/or exemplary damages. The words complained of by the plaintiff were published in a feature article entitled 'Malaysia justice on trial' in the 11 November 1995 issue of the *International Commercial Litigation* magazine. The plaintiff also alleges that the caricature in the cover illustration of the magazine supports his 'habitual corruption' allegation as the caricature, as understood by the plaintiff, depicts a Malaysian judge, a Malaysian flag and a shady individual in a rain coat. The first defendant at the material time was staff writer of the said *International Commercial Litigation* magazine published by the fourth defendant. The second defendant was the editor of the said magazine. The third defendant was the editorial publisher of the magazine. The fourth defendant was at the material time proprietor and publisher of the magazine. The defendants have not entered appearance. In fact, they have not submitted to the jurisdiction of this court.

Held, dismissing the plaintiff's claim:

(1) The plaintiff's pleading is defective. As the article is a long article, the plaintiff, besides pleading the whole article, should have, in addition, pleaded the particular words or phrases or sentences or paragraphs in the article which, when read in the context of the whole article, are defamatory to the plaintiff in the manner as pleaded. Instead, in the present case, the plaintiff merely pleaded the whole article (see para 12); *Scott v Fourth Estate* (1986) 1 NZLR 336 followed.

(2) The plaintiff has not pleaded any legal innuendo. Thus the plaintiff is relying on inferences to be made from certain words or sentences or paragraphs in the article. But the plaintiff must plead the words or phrases or sentences or paragraphs on which he is inviting the court to make the inferences suggested by him. It is not the duty of the court on its own volition to speculate and to pick out a case for the plaintiff, a case that fits his statement of claim, particularly where the plaintiff is basing his claim on a long article (see para 13).

(3) Such an interpretation or understanding of the caricature is baseless and far-fetched — if not absurd. The burly judge with the long wig, in a red robe and sitting on the bench (as depicted in the caricature) does not at all represent a Malaysian judge, for a Malaysian judge does not wear anything on his head, let alone a long wig. In any open court proceeding, the Malaysian judge wears a black robe, and not a red robe. The judge in the long wig and the red robe looks more like an English judge. Moreover, what is said to be a Malaysian flag does not look like a flag at all. For one thing, the picture in the caricature is incomplete. It could be part of a flag; it could be part of a curtain; or it could be part of a blind. Thus, the picture could be that of anything (see para 14).

(4) There is a common law principle established as early as 1775 that a person cannot bring an action based on his own wrong (*ex turpi causa non oritur action*) (see *Broom's Legal Maxims* (10th Ed) p 497; and *Re Sigsworth* [1935] Ch 89; see also *Learning the Law* (11th Ed by Glanville Williams, p 109). That the plaintiff is guilty of wrongdoings, namely, abusing and manipulating the process of court so as to cause injustice to the defendants before the High Court in the *Ayer Molek* case is clear from the judgment of the Court of Appeal in the case, which is the main subject of the article, as reported in *Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor* [1995] 2 MLJ 734. The judgment of the Court of Appeal is referred to by the plaintiff in his evidence. It is the plaintiff's own wrongful conduct in the *Ayer Molek*'s case that led to the publication of the article (see para 15).

(5) Therefore, the so-called 'Federal Court' was not a legally constituted court under the law and the Constitution of this country. It was not a legally constituted Federal Court because under s 74 of the Courts of Judicature Act 1964, the minimum number of judges in a Federal Court panel has to be three legally competent judges. However, the panel of three judges of the so-called 'Federal Court' that sat in the *Ayer Molek* case to hear the stay and leave application comprised only two legally competent judges, namely, YAA Tun Hj Mohd Eusoff bin Chin (the then Chief Justice of the Federal Court) and YA Dato' (Dr) Zakaria bin Mohd Yatim (then a judge of the Court of Appeal): the third judge in the panel, namely, YA Dato' Pajan Singh Gill was not legally competent to sit on a Federal Court panel as he was then only a High Court judge. According to art 122(2) of the Federal Constitution only a judge of the Court of Appeal may be nominated by the Chief Justices to sit as a judge of the Federal Court. The Chief Justice cannot nominate a High Court judge to sit on the Federal Court (see paras 23–24).

(6) The inherent defect in the panel was two-fold. First, there were only two legally competent judges in the panel. Second, a legally incompetent judge had been invited to sit on the panel. The composition of the panel and the sitting was

therefore a violation of s 74 of the Courts of Judicature Act 1964 and also a violation of art 122(2) of the Federal Constitution. The panel was therefore unlawful and unconstitutional. An unlawful and unconstitutional panel of judges cannot stay, criticize or expunge the judgment of a lawfully constituted Court of Appeal. The 'order' or 'judgment' of the panel is unlawful, invalid and is of no legal effect (see para 26). Therefore, the judgment of the Court of Appeal in the *Ayer Molek* case is still wholly intact and is still a valid and binding judgment in deciding on the plaintiff's claim in this section (see para 32).

[Bahasa Malaysia summary

Tindakan fitnah ini difailkan oleh plaintif, seorang peguambela dan peguamcara, terhadap defendan untuk libel. Plaintif menuntut ganti rugi sebanyak RM100 juta termasuk ganti rugi teruk dan/atau ganti rugi teladan. Perkataan-perkataan yang diadu oleh plaintif diterbitkan di dalam sebuah artikel yang berjudul 'Malaysia justice on trial' pada isu 11 November 1995 dalam majalah *International Commercial Litigation*. Plaintif juga mengatakan pelukisan karikatur di muka hadapan majalah tersebut menyokong pengataan 'tabiat rasuah' beliau oleh kerana karikatur seperti yang difahami oleh plaintif, memaparkan seorang hakim Malaysia, bendera Malaysia dan seorang individu yang berpakaian baju hujan. Defendan pertama pada semua masa yang material adalah penulis bagi majalah *International Commercial Litigation* tersebut yang diterbitkan oleh defendan keempat. Defendan kedua merupakan penyunting majalah tersebut. Defendan ketiga adalah penerbit majalah tersebut. Defendan keempat pada masa material adalah pemilik dan penerbit majalah tersebut. Defendan-defendan tidak memfailkan sebarang notis kehadiran. Sebenarnya mereka langsung tidak menyerah kepada bidang kuasa mahkamah ini.

Diputuskan, menolak tuntutan plaintif:

(1) Pliding plaintif adalah cacat. Oleh kerana artikel tersebut adalah satu artikel yang panjang, plaintif, selain daripada memplidkan keseluruhan artikel tersebut, sepatutnya juga, tambahan, memplidkan secara terperinci perkataan-perkataan atau frasa-frasa atau ayat-ayat atau perenggan-perenggan di dalam artikel tersebut yang, apabila dibaca di dalam konteks keseluruhan artikel tersebut, adalah fitnah kepada plaintif dalam ragam yang diplidkan. Akan tetapi, dalam kes ini, plaintif hanya memplidkan keseluruhan artikel tersebut (lihat perenggan 12); *Scott v Fourth Estate* (1986) 1 NZLR 336 diikut.

(2) Plaintif tidak memplidkan sebarang sindiran undang-undang. Dengan itu plaintif berdasarkan atas inferens yang didapati daripada perkataan-perkataan atau ayat-ayat atau perenggan-perenggan di dalam artikel tersebut. Akan tetapi plaintif mesti memplidkan perkataan-perkataan atau frasa-frasa atau ayat-ayat atau perenggan-perenggan di mana ia mempelawa mahkamah untuk membuatkan inferens seperti yang dicadangkannya. Ia bukanlah kewajipan mahkamah atas keazamannya sendiri untuk mengagak dan mewujudkan satu

kes untuk plaintif, satu kes yang memadankan pernyataan tuntutannya, terutama apabila plaintif berdasarkan tuntutannya di atas satu artikel yang panjang (lihat perenggan 13).

(3) Tafsiran atau pemahaman karikatur adalah tidak berasas dan jauh daripada kenyataan — jika bukan tidak munasabah. Hakim berbadan besar dengan rambut palsu yang panjang, berpakaian jubah dan duduk di atas kerusi (seperti yang dipaparkan oleh karikatur tersebut) tidak sama sekali mewakili seorang hakim Malaysia, oleh kerana seorang hakim Malaysia tidak memakai sebarang apa pun di kepala mereka, apa lagi rambut palsu. Di mahkamah terbuka, hakim Malaysia berjubah hitam dan bukan berjubah merah. Hakim dengan rambut palsu yang panjang dan berjubah merah lebih kelihatan sebagai hakim Inggeris. Lanjutan, apa yang dikatakan sebagai bendera Malaysia tidak seperti bendera langsung. Gambar karikatur tersebut adalah tidak sempurna. Ia berkemungkinan sebahagian bendera; ataupun sebahagian langsir; ataupun sebahagian bidai. Dengan itu, gambar tersebut boleh dikatakan apa sahaja (lihat perenggan 14).

(4) Terdapat prinsip common law yang ditubuhkan seawal 1775 bahawa seseorang tidak boleh mengambil tindakan berdasarkan kesalahannya sendiri (ex turpi causa non oritur action) (lihat *Broom's Legal Maxims* (10th Ed) p 497; dan *Re Sigsworth* [1935] Ch 89; lihat juga *Learning the Law* (11th Ed) oleh Glanville Williams, p 109). Bahawa plaintif adalah bersalah atas perbuatan yang salah, iaitu, penyalahgunaan dan memanipulasikan proses mahkamah yang menyebabkan ketidakadilan kepada defendan-defendan di Mahkamah Tinggi di dalam kes Ayer Molek adalah jelas daripada penghakiman Mahkamah Rayuan di dalam kes tersebut, di mana ia merupakan subjek utama artikel tersebut, seperti yang di laporkan di *Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor* [1995] 2 MLJ 734. Penghakiman Mahkamah Rayuan adalah dirujuk kepada oleh plaintif di dalam keterangannya. Adalah kelakuan salah plaintif sendiri dalam kes *Ayer Molek* yang menyebabkan percetakan artikel tersebut (lihat perenggan 15).

(5) Oleh itu, 'Mahkamah Persekutuan' yang dikatakan itu bukanlah mahkamah yang dibentuk secara sah di bawah undang-undang dan Lembaga negara ini. Ia bukannya satu Mahkamah Persekutuan yang dibentuk secara sah oleh kerana di bawah s 74 Akta Kehakiman Mahkamah 1964 nombor minima hakim-hakim di dalam panel Mahkamah Persekutuan adalah tiga hakim yang kompeten di sisi undang-undang. Akan tetapi, tiga panel hakim-hakim di 'Mahkamah Persekutuan' yang dikatakan itu, yang mendengar kes Ayer Molek untuk permohonan penggantungan dan kebenaran hanya terdiri daripada dua hakim yang kompeten di sisi undang-undang, iaitu YAA Tun Hj Mohd Eusoff bin Chin (pada ketika itu Hakim Besar Mahkamah Persekutuan) dan YA Dato' (Dr) Zakaria bin Mohd Yatim (pada ketika itu hakim Mahkamah Rayuan): hakim ketiga panel, iaitu YA Dato' Pajan Singh Gill adalah tidak kompeten di sisi undang-undang untuk membentuk panel Mahkamah Persekutuan oleh kerana pada mada itu beliau hanya hakim Mahkamah Tinggi. Mengikut perkara 122(2) Lembaga Persekutuan hanya seorang hakim Mahkamah Rayuan boleh dilantik oleh Hakim-Hakim Besar untuk menyertai panel Mahkamah Persekutuan (lihat perenggan 23–24).

(6) Kecacatan yang wujud di dalam panel tersebut adalah berpenjuru dua. Pertama, hanya terdapat dua hakim yang kompeten di sisi undang-undang di panel tersebut. Kedua, seseorang hakim yang tidak kompeten di sisi undang-undang telah dipelawa untuk menyertai panel tersebut. Komposisi panel tersebut dengan itu adalah satu perlanggaran s 74 Akta Kehakiman Mahkamah 1964 dan juga pelanggaran perkara 122(2) Lembaga Persekutuan. Panel tersebut dengan itu adalah salah di sisi undang-undang dan tidak berperlembagaan. Sesuatu panel hakim yang menyalahi undang-undang dan tidak berperlembagaan tidak boleh menggantungkan, mengkritik ataupun menghapuskan penghakiman yang diberikan oleh Mahkamah Rayuan yang terdiri daripada hakim-hakim yang sah di sisi undang-undang. 'Perintah' atau 'penghakiman' oleh panel tersebut adalah tidak sah di sisi undang-undang, tidak sah dan tidak mempunyai apa-apa kesan undang-undang (lihat perenggan 26). Dengan itu, penghakiman Mahkamah Rayuan di dalam kes *Ayer Molek* adalah tidak terjejas dan merupakan penghakiman yang masih sah dan terikat dalam menentukan tuntutan plaintif di dalam seksyen ini (lihat perenggan 32).]

Notes

For cases on defamation pleadings, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 4743–4746.

For cases on Federal Court, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1677–1678.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 314–434.

Cases referred to

Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor [1995] 2 MLJ 734 (folld)

Hunter v Chief Constable [1982] AC 529; [1981] 3 All ER 727; [1981] 3 WLR 906 (refd)

Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors [1995] 2 MLJ 833 (refd)

Insas Bhd & Anor v David Samuels & Ors [2005] 1 MLJ 115 (refd)

Isaacs & Robertson [1985] 1 AC 97 (refd)

Majlis Peguam v V Kanagalingam [1998] 3 CLJ Supp 257 (refd)

Scott v Fourth Estate (1986) 1 NZLR 336 (folld)

Sigsworth, Re [1935] Ch 89 (folld)

Legislation referred to

Companies Act 1965 s 103(1)

Courts of Judicature Act 1964 s 74

Federal Constitution art 122(2)

Dato' V Sithambaram (R Thayalan with him) (Siva & Partners) for the plaintiff. Defendants absent.

Mohd Hishamudin J:

[1] This is a defamation suit by the plaintiff, an advocate and solicitor, against the defendants for libel. The plaintiff claims damages in the sum of RM100 million including aggravated and/or exemplary damages.

[2] The words complained of by the plaintiff were published in a feature article entitled '*Malaysia justice on trial*' in the 11 November 1995 issue of the *International Commercial Litigation* magazine.

[3] The words complained of by the plaintiff are set out in paragraph 6 of the statement of claim. They are as follows:

> 6. On pages 10 to 14 of November 1995 issue of the *International Commercial Litigation* (hereinafter referred to as 'the Magazine'), in a feature article entitled 'Malaysian justice in trial' (which article was the cover story for that issue, and was highlighted on the front cover of the Magazine), the first defendant wrote and published the second, third and the fourth defendants published, of and concerning the plaintiff, and of and concerning him in the way of his said profession and in relation to his conduct therein the following defamatory words:

[As the feature article is a long article, I have set it out separately in the Schedule to this judgment.]

> 7. The said words and illustration complained of in Paragraph 6 hereof in their natural and ordinary meaning meant and were understood to mean:
>
> (1) that the plaintiff was guilty of corruption, or the attempted corruption of the Malaysian judiciary on an habitual basis for the purpose of obtaining special favours for his clients in litigations;
>
> (2) that by so doing, the plaintiff had undermined confidence in the whole system of justice in Malaysia;
>
> (3) that the plaintiff had lied to Judge Vohrah on 19 August 1995.

[4] The first defendant at the material time was staff writer of the said *International Commercial Litigation* magazine published by the fourth defendant.

[5] The second defendant was the editor of the said magazine.

[6] The third defendant was the editorial publisher of the magazine.

[7] The fourth defendant was at the material time proprietor and publisher of the magazine.

[8] The defendants have not entered appearance. In fact, they have not submitted to the jurisdiction of this court.

[9] In his written submissions, the learned counsel for the plaintiff submitted among others the case of *Insas Bhd & Anor v David Samuels & Ors* [2005] 1 MLJ 115.

[10] I have dismissed the plaintiff's claim.

[11] My grounds are as follows.

[12] First, I find that the plaintiff's pleading is defective. As the article is a long article, the plaintiff, besides pleading the whole article, should have also, in addition, pleaded the particular words or phrases or sentences or paragraphs in the article which, when read in the context of the whole article, are defamatory to the plaintiff in the manner as pleaded. Instead, in the present case, the plaintiff merely pleaded the whole article. In *Scott v Fourth Estate* [1986] 1 NZLR 336 Williamson J said (at pp 339–340):

> … it must be a rare case where a plaintiff can plead a whole article without particularizing the passages in the articles that he complains of. It may be appropriate to plead the whole article in order to claim that certain passages or libelous statements take their meaning from the article, as a whole, but in order to focus the dispute it is important that the allegedly defamatory passages be sufficiently identified.

[13] The plaintiff has not pleaded any legal innuendo. Thus, the plaintiff is relying on inferences to be made from certain words or sentences or paragraphs in the article. But the plaintiff must plead the words or phrases or sentences or paragraphs on which he is inviting the court to make the inferences suggested by him. It is not the duty of the court on its own volition to speculate and to pick out a case for the plaintiff, a case that fits his statement of claim, particularly where the plaintiff is basing his claim on a long article.

[14] Second, the plaintiff alleges that the caricature in the cover illustration of the magazine supports his 'habitual corruption' allegation as the caricature, as understood by the plaintiff, depicts a Malaysian judge, a Malaysian flag and a shady individual in a rain coat. In my judgment, such an interpretation or understanding of the caricature is baseless and far-fetched — if not absurd. As I see it, the burly judge with the long wig, in a red robe and sitting on the bench (as depicted in the caricature) does not at all represent a Malaysian judge, for a Malaysian judge does not wear anything on his head, let alone a long wig. In any open court proceeding, the Malaysian judge wears a black robe, and not a red robe. The judge in the long wig and the red robe looks more like an English judge. Moreover, what is said to be a Malaysian flag does not look like a flag at all. For one thing, the picture in the caricature is incomplete. It could be part of a flag; it could be part of a curtain; or it could be part of a blind. Thus, the picture could be that of anything. And assuming for the sake of argument that it is the picture of a flag, it is not the picture of a Malaysian flag. The Malaysian flag has the picture of a moon crescent and a 14-point star; and the background colour of the moon crescent and star is dark blue. But in the caricature on the cover of the magazine, what I observe, instead, is a 17-point star, with the background colour being light blue; and as the picture is incomplete I cannot say with certainty that what I see is *part* of moon crescent. Further, the Malaysian flag consists of fourteen red and white stripes; whereas in the caricature one finds fourteen white and maroon stripes (even the white stripes are not pure white: one sees within the white stripes some grey stripes). As a further observation, the caricature depicts a man in trench coat and wearing a hat, that is to say, an attire that is normally worn by men in European countries, observing an English judge conducting a court hearing. It was not a raincoat that the man was wearing, as alleged by the plaintiff; and to my mind there is nothing 'shady' about the man in the trench coat.

[15] Thirdly, and more important, there is a common law principle established as early as 1775 that a person cannot bring an action based on his own wrong (*ex turpi causa non oritur action*) (see *Broom's Legal Maxims* (10th Ed) p 497; and *Re Sigsworth* [1935] Ch 89; see also *Learning the Law* (11th Ed) by Glanville Williams, p 109). That the plaintiff is guilty of wrongdoings, namely, abusing and manipulating the process of court so as to cause injustice to the defendants before the High Court in the *Ayer Molek* case is clear from the judgment of the Court of Appeal in the case, which is the main subject of the article, as reported in *Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor* [1995] 2 MLJ 734. The judgment of the Court of Appeal is referred to by the plaintiff in his evidence. It is the plaintiff's own wrongful conduct in the *Ayer Molek's* case that led to the publication of the article.

[16] But in order to appreciate the article, and the legal implications, one has to know the facts of the *Ayer Molek* case. The facts are clearly set out by the judgment of the Court of Apppeal as delivered by NH Chan JCA. They are as follows:

> On 10 April 1995, the plaintiffs (who are the respondents in the present motion before us) obtained on an ex parte interlocutory application before a judge of the High Court mandatory injunctions against the defendants, the first to the tenth of whom are the applicants) before this court. The order reads as follows:
>
> It is hereby ordered that an injunction be made against the eleventh defendant to forthwith process the share certificates for the 540,000 ordinary shares and register the names of the plaintiffs in the share register of the first defendant and further issue the following new share certificates within two working days of receipt from the plaintiffs:
>
> (i) one new share certificate in the name of the first plaintiff for 360,000 ordinary shares.
>
> (ii) four new share certificates in the name of the second plaintiff which are:
>
> One new share certificate for 85,000 ordinary shares; one new share certificate for 40,000 ordinary shares; one new share certificate for 45,000 ordinary shares and one new share certificate for 10,000 ordinary shares respectively.
>
> (iii) And to forward all the above five new share certificates to the third defendant within two working days from the date of receipt of the 540,000 ordinary shares.
>
> It is further ordered that an injunction be made against the third, eight, ninth and or tenth defendants to forthwith within two working days from the date of receipt from the eleventh defendant of the five new share certificates to affix the signatures of both the third and the eight, ninth and/or tenth defendants on the five new share certificates and further the third defendant do forthwith be ordered and directed to forward the five new share certificates to the eleventh defendant for onward transmission to the plaintiffs within two working days from date of receipt of the new share certificates from the eleventh defendant and to do all or any acts necessary to complete the registration of the 540,000 shares into the names of the plaintiffs.
>
> It is further ordered that injunction be made against the second, fourth, fifth, sixth and seventh defendants restraining them whether by themselves, their servants and/or agents and/or otherwise howsoever from interfering/interrupting or causing any hindrance in any manner whatsoever in the registration and issuance of the five new share certificates for the 540,000 ordinary shares of the first defendant into the names of the plaintiffs. It is also ordered that if the defendants or their officers, servants or agents or representatives disobey this order of this honourable court they will be committed to imprisonment for contempt of this honourable court. It is lastly ordered that the costs of and incidental to this application be in the cause of this action.

The ex parte order compels the defendants to effect: (a) the registration of the transfer of 540,000 ordinary shares of the first defendant company to the plaintiffs in the share register of the company and (b) the issue of new share certificates in the plaintiffs' names, within two working days of their receiving the share certificates. The order was served on the defendants on 11 April 1995.

The plaintiffs' affidavit in support of the ex parte application for the injunction before the High Court tries to create an impression that the first defendant was trying to thwart the registration of the transfer of these shares to the plaintiffs but the plaintiffs were unable to say that the company had refused to register the transfer. The affidavit also attempts to give a vague impression that the other defendants, who are directors of the first defendant company, were obstructive with the same purpose of preventing the registration of the shares. Again it did not say how these directors have obstructed or prevented the registration of these shares. But what the affidavit failed to do was to bring to the notice of the court the statutory prohibition under s 103(1) of the Companies Act 1965 against a company registering a transfer of shares unless a proper instrument of transfer in the prescribed form had been delivered to the company. Section 103(1) reads:

> 103. Instrument of transfer
>
> (1) Notwithstanding anything in its articles a company shall not register a transfer of shares or debentures unless a proper instrument of transfer in the prescribed form has been delivered to the company, but this subsection shall not prejudice any power to register as a shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

There having been no delivery of any instrument of transfer to the company as required by law, how could the plaintiffs have resorted to the High Court to compel the company to register the transfer of the shares? In fact, not only was there no delivery of any instrument of transfer to the company, there was also no evidence of any refusal by the company to register the transfer of the shares. Section 105 of the Companies Act 1965 reads:

> 105. Notice of refusal to register transfer
>
> (1) If a company refuses to register a transfer of any share debenture or other interests in the company it shall, within one month after the date on which the transfer was lodged with it, send to the transferor and to the transferee notice of the refusal.
>
> (2) If default is made in complying with this section the company and every officer of the company who is in default shall be guilty of an offence against this Act.
>
> Penalty: One thousand ringgit. Default penalty.

On 12 April 1995, the first to the tenth defendants filed an application to set aside the ex parte mandatory order of 10 April 1995. That application came up for hearing before the judge on 13 April 1995 but he adjourned it to 27 April 1995 which was after the two day period he had allowed for compliance of his ex parte order. The defendants immediately applied for a stay of the ex parte mandatory order pending disposal of their application to discharge it. The judge refused to grant a stay of his ex parte order. On 14 April 1995, the transfer of the shares was registered in the share register of the first defendant company and new share certificates were issued to the plaintiffs under compulsive compliance of the ex parte order.

On 18 April 1995, the first to the tenth defendants filed notice of appeal against the ex parte mandatory order of 10 April 1995 to the Court of Appeal. On the same day, they also filed the present motion for a stay of the ex parte order pending appeal.

[17] The conduct of the plaintiff in the present action, Dato' VK Lingam, who was the solicitor and counsel for the plaintiff before Azmel J at the High Court stage in the *Ayer Molek* case, was severely criticized by the Court of Appeal in its judgment. The Court of Appeal made a finding that the plaintiff as solicitor and counsel for the plaintiffs in the *Ayer Molek* case was guilty of abusing and manipulating the process of court so as to cause injustice to the defendants in the case. This is what the Court of Appeal says:

> This is a motion by the appellants to stay an ex parte mandatory injunction pending appeal to the Court of Appeal. But this case is more than that. This is a case about an injustice which has been perpetrated by a court of law. This is also a case about abuse of the process of the High Court and, therefore, it concerns the inherent power which any court of justice must possess to prevent misuse of its procedure and in which the court has a duty to exercise this salutary power.
>
> Although the ex parte mandatory injunction should not have been granted in the circumstances of this case in the first place, that is not the injustice which is revealed in this case. The injustice is manifest, it is to be seen in the form in which the order is framed, the terms of which pre-empt the defendants from exercising their right to apply to discharge an ex parte injunction obtained behind the backs of the defendants. Here the plaintiffs through their legal advisers have abused the process of the High Court by instigating the injustice through misuse of the court's procedure by manipulating it in such a way that it becomes manifestly unfair to the defendants. By doing what they did these unethical lawyers have brought the administration of justice into disrepute among right thinking people.
>
> We do not think we can do better with this censure than to voice and emphasise the opening words of Lord Diplock in his judgment in the House of Lords in *Hunter v Chief Constable* [1982] AC 529, at 536; [1981] 3 All ER 727 at p 729; [1981] 3 WLR 906 at p 909:
>
> > My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application, of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

[18] In the above passage, the reference to the plaintiffs' 'legal advisers' include the plaintiff in the present action, Dato' VK Lingam who, as I have said earlier, was the solicitor and counsel for the plaintiffs in the *Ayer Molek* case at the High Court stage. At a later part of the judgment, the Court of Appeal went on to say:

> The ex parte order in the instant case which compels compliance of it within two working days and the subsequent conduct of the judge in adjourning the application of the defendants to set aside the ex parte order to a date after the period allowed for compliance of the order (without granting a stay of that ex parte order) has effectively deprived the defendants from exercising their right to apply to set aside an ex parte injunction. This misuse of the court's procedure, in our view, is manifestly unfair to a party to litigation before it. The court, therefore, has a duty to exercise its inherent power to prevent misuse of its procedure.

Since the order which was obtained through abuse of the process of the High Court had been complied with, it is no longer possible for this court to stay the ex parte order. Not only are the shares now registered in the plaintiffs' names, they can now also enjoy the benefits of registration; the process of becoming a member and shareholder of a company is incomplete until entry on the register. But, that does not mean this court is powerless to prevent an injustice. The shares, although they are now registered in the name of the plaintiffs' can be preserved pending the outcome of the appellants' appeal to the Court of Appeal. So we granted an interim order to prevent prejudice to the claims of the parties pending the hearing of the appeal in these terms:

> Pending the disposal of the appeal, the respondents be and are hereby restrained from enjoying or exercising any rights, including disposing of the shares whether directly or indirectly, attached to the shares described in the ex parte order dated 10 April 1995.

Thus we have exercised our inherent power to prevent further injustice from being perpetrated.

[19] The Court of Appeal concluded its judgment by further criticizing the plaintiff. The chiding remark (but cautiously worded though) concerned the conduct of the plaintiff as solicitor for the plaintiffs in the *Ayer Molek* case on filing the action in the Appellate and Special Powers Division of the High Court of Kuala Lumpur instead of the Commercial Division of the High Court of Kuala Lumpur. Such a course of action might give the impression to right-thinking people that the plaintiff was choosing the judge that would be hearing his clients' case. This is what the court says:

> There is also another aspect of this case which warrants our comment. It is this. The respondents' general endorsed writ avers to a cause of action which is commercial in nature and that being the case, the proceedings should have commenced in the Commercial Division of the High Court at Kuala Lumpur. The heading, however, states otherwise as it carries a registration number, R 3–25–3–1995 issued by the Appellate and Special Powers Division. We are very much aware that a civil suit registered in one of the three Civil Divisions of the High Court at Kuala Lumpur can, for good reason, be transferred to another Division of the High Court, but when that happens the registration numbers issued by the two Divisions concerned would appear on the heading, with one substituting for the other. In this instance, there was no likelihood of that happening as the only registration number, R 3–25–3–1995 is unmistakably an Appellate and Special Powers Division number, thereby indicating that the respondents had filed their general indorsed writ in that Division and not in the Commercial Division as should have been the case.
>
> The fact that the proceedings were filed in the wrong Division does not render the proceedings to be in any way invalid but may, coupled with other considerations in the present case, give the impression to right-thinking people that litigants can choose the judge before whom they wish to appear for their case to be adjudicated upon. This, we consider, may lead to very unhealthy negative thinking and since justice must not only be done but must also be seen to be done, it is incumbent on the trial judge, upon perusal of the pleadings, to have taken the initiative of transferring the proceedings to the right Division so as to dispel any notion that he is partial to any party. This is yet another added reason that strengthened our conviction that it is right and proper that we exercise our inherent power to prevent an injustice being done by the issue of an interim injunction restraining the respondents from enjoying the fruits of the registration of the infamous shares into their names. These observations are made so that people will not say, 'Something is rotten in the state of Denmark.' — Shakespeare, Hamlet, 1.

[20] Clearly, the quotation at the end of the above passage attributed to Shakespeare's *Hamlet* was meant to be a pun, for the High Court that heard the *Ayer Molek* case was located in Denmark House. Without doubt the rebuke by the Court of Appeal was directed at both the High Court judge and the solicitor/counsel concerned, that is to say, the plaintiff in the case before me.

[21] The plaintiff in the present case, however, submits that the judgment of the Court of Appeal was no longer relevant as the material portions that contain the adverse remarks had been 'expunged' by the 'judgment' of the 'Federal Court' in the reported case of *Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors* [1995] 2 MLJ 833 (do note that I have written the words 'expunged', 'judgment' and 'Federal Court' in inverted commas and the reason for this will be explained in due course). What happened was, on 27 July 1995, that is to say, the very next day after the Court of Appeal decision of 26 July 1995, the plaintiffs in the *Ayer Molek* case (the respondents before the Court of Appeal) made an application before the Federal Court seeking a stay and leave to appeal against the decision of the Court of Appeal. This application was promptly heard by the 'Federal Court' five days later on 1 August 1995. On the 1st of August itself, the application for a stay and for leave was purportedly granted (the full written 'judgment' of the 'Federal Court' was delivered by the Registrar on 12 August 1995). In purporting to grant a stay and leave to appeal, the 'Federal Court' harshly criticized the Court of Appeal Judges, even to the extent of accusing the learned judges of the Court of Appeal of being bias and taking sides and purportedly expunged certain passages from the judgment of the Court of Appeal. The passages purportedly expunged are as follows:

> But this case is more than that. This is a case about an injustice which has been perpetrated, by a court of law. This is also a case about abuse of the process of the High Court and, therefore, it concerns the inherent power which any court of justice must possess to prevent misuse of its procedure and in which the court has a duty to exercise this salutary power.
>
> Although the ex parte mandatory injunction should not have been granted in the circumstances of this case in the first place, that is not the injustice which is revealed in this case. The injustice is manifest: it is to be seen in the form in which the order is framed, the terms of which pre-empt the defendants from exercising their right to apply to discharge an ex parte injunction obtained behind the backs of the defendants. Here, the plaintiffs through their legal advisers have abused the process of the High Court by instigating the injustice through misuse of the court's procedure by manipulating it in such a way that it becomes manifestly unfair to the defendants. By doing what they did, these unethical lawyers have brought the administration of justice into disrepute among right-thinking people.
>
> We do not think we can do better with this censure than to voice and emphasise the opening words of Lord Diplock in his judgment in the House of Lords in *Hunter v Chief Constable* [1982] AC 529, at p 536; [1981] 3 All ER 727 at p 729; [1981] 3 WLR 906 at p 909:
>
> > My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any Court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view,

> be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the Court has a duty (I disavow the word discretion) to exercise this salutary power.
>
> The fact that the proceedings were filed in the wrong Division does not render the proceedings to be in any way invalid but may, coupled with other considerations in the present case, give the impression to right thinking people that litigants can choose the judge before whom they wish to appear for their case to be adjudicated upon. This, we consider, may lead to very unhealthy negative thinking and since justice must not only be done but must also be seen to be done it is imperative for the trial Judge, upon perusal of the pleadings, to have taken the initiative of transferring the proceedings to the right Division so as to dispel any notion that he is partial to any party.

[22] It is pertinent to point out here that the panel made the following harsh remarks on the Court of Appeal judges:

> Then why should the learned judges of the Court of Appeal go on a frolic of their own to find fault with the High Court judge, and criticize the conduct of the applicants' solicitors in a very disparaging manner. Their own conduct would tend to show that they were themselves biased and taking the side of the respondents against the applicants, the High Court judge and the applicants' solicitors.
>
> …
>
> In expunging these totally unwarranted and unjustified remarks from the judgment of the Court of Appeal written on 31 July 1995, we must place on record of our disappointment and displeasure (to put it mildly) at the conduct of the three judges of the Court of Appeal for having without any justification criticized those who were not given the opportunity to defend or explain themselves.

[23] With respect, I am not persuaded by the argument of learned counsel for the plaintiff. In my judgment, the so-called 'Federal Court' was not a legally constituted court under the law and the Constitution of this country. The panel of judges that participated in the proceeding cannot be called or recognized as the Federal Court at all. It was merely a panel of judges calling itself or rather purporting to be the 'Federal Court'.

[24] It was not a legally constituted Federal Court because under s 74 of the Courts of Judicature Act 1964, the minimum number of judges in a Federal Court panel has to be three legally competent judges. However, the panel of three judges of the so-called 'Federal Court' that sat in the *Ayer Molek* case to hear the stay and leave application comprised only two legally competent judges, namely, YAA Tun Hj Mohd Eusoff Bin Chin (the then Chief Justice of the Federal Court) and YA Dato' (Dr) Zakaria bin Mohd Yatim (then a judge of the Court of Appeal): the third judge in the panel, namely, YA Dato' Pajan Singh Gill was not legally competent to sit on a Federal Court panel as he was then only a High Court judge. According to art 22(2) of the Federal Constitution only a judge of the Court of Appeal may be nominated by the Chief Justices to sit as a judge of the Federal Court. The Chief Justice cannot nominate a High Court judge to sit on the Federal Court. This article reads:

(2) A judge of the Court of Appeal other than the President of the Court of Appeal may sit as a judge of the Federal Court where the Chief Justice considers that the interests of justice so require, and the judge shall be nominated for the purpose (as the occasion requires) by the Chief Justice.

[25] Section 74 of the Courts of Judicature Act 1964 provides —

74. Composition of the Federal Court.

(1) Subject as hereinafter provided, every proceeding in the Federal Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Chief Justice may in any particular case determine.

[26] The inherent defect in the panel was two-fold. First, there were only two legally competent judges in the panel. Second, a legally incompetent judge had been invited to sit on the panel. The composition of the panel and the sitting was therefore a violation of s 74 of the Courts of Judicature Act 1964 and also a violation of art 122(2) of the Federal Constitution by the three judges that I have named. The panel was therefore unlawful and unconstitutional. An unlawful and unconstitutional panel of judges cannot stay, criticize or expunge the judgment of a lawfully constituted Court of Appeal. The 'order' or 'judgment' of the panel is unlawful, invalid and is of no legal effect. And in this judgment, I shall just ignore the purported 'order' or purported 'judgment' of the unlawful panel. Indeed, it would be fair to say that the panel was prima facie in contempt of the Court of Appeal (a lawfully constituted court) particularly considering that its so-called 'judgment' contains harsh and unwarranted criticism of the judges of the Court of Appeal even to the extent of accusing the learned judges of the Court of Appeal of being bias and taking sides. It would be fair to infer that the panel of senior judges headed by no less a personality as the then Chief Justice himself must be presumed to be aware of the provisions of s 74 of the Courts of Judicature Act 1964 and art 122(2) of the Federal Constitution.

[27] The learned counsel for the plaintiff in urging this court to confer recognition to the 'Federal Court', relied on the High Court case of *Majlis Peguam v V Kanagalinga* [1998] 3 CLJ Supp.257. The facts of this case are that a complaint was lodged by the Bar Council to the Disciplinary Board based on the criticisms of the conduct of counsel Dato' V Kanagalingam by the Court of Appeal in the *Ayer Molek* case. The Disciplinary Board dismissed the complaint of the Bar Council and the Bar Council appealed to the High Court, presided by three High Court judges under the Legal Profession Act 1976. The High Court held that since the entire complaint by the Bar Council was based on the criticisms of Dato' V Kanagalingam in the Court of Appeal judgment, which was 'expunged' by the 'Federal Court' the substratum and basis of the Bar Council's complaint no longer existed. In this case cited, Hashim Yusoff J (as he then was) said:

Tetapi peguam perayu masih cuba menongkat tindakan perayu dengan menghujahkan bahawa keputusan Mahkamah Persekutuan itu masih boleh disoalkan kerana korum Mahkamah Persekutuan berkenaan dikatakan tidak betul.

[28] It is pertinent to observe that Hashim Yusoff J having stated the issue, however, did not elaborate on the exact nature of the argument of the Bar Council (*Majlis Peguam*) on the quorum issue (that is as to why the quorum is said to be improper ('*tidak betul*')).

[29] Having omitted to set out the exact nature of the argument of the Bar Council (*Majlis Peguam*) on the issue of quorum, the learned Judge then, at a later part of the judgment, nevertheless, went on to say —

> Walau apa pun, sesuatu keputusan Mahkamah Perseketuan adalah mengikati dan menaklukki segala mahkamah yang tertakluk kepadanya termasuk Mahkamah Tinggi di bawah doktrin 'Stare Decisis'. Bukan menjadi tugas kami untuk menyoal keesahan keputusan tersebut dan memang bukan tujuan kami untuk berbuat demikian. Di sini rujukan boleh dibuat kepada apa yang dikatakan oleh Lord Diplock di Privy Council di dalam kes *Isaacs & Robertson* [1985] 1 AC 97, di ms101 …

[30] Thus, the issue raised by the Bar Council was glossed over or sidestepped by the High Court in *Majlis Peguam*.The High Court merely cited the doctrine of *stare decisis* and quoted an irrelevant passage from the judgment of Lord Diplock in the Privy Council case of *Isaacs & Robertson* [1985] 1 AC 97. All this, with respect, is red herring. It is to be noted that by saying —

> Bukan menjadi tugas kami untuk menyoal keesahan keputusan tersebut …

the High Court in *Majlis Peguam*, with respect, was addressing an issue different from that posed to it by the Bar Council. The High Court was merely addressing the issue of the validity of the 'decision' of the 'Federal Court' in the *Ayer Molek* case. But the issue raised by the Bar Council was more fundamental than that. The Bar Council had questioned the *quorum* of the 'Federal Court' and not just the *decision* of the 'Federal Court', for as Hashim Yusoff J himself has said earlier (to repeat) —

> Tetapi peguam perayu masih cuba menongkat tindakan perayu dengan menghujahkan bahawa keputusan Mahkamah Perseketuan itu masih boleh disoalkan kerana korum Mahkamah Perseketuan berkenaan dikatakan tidak betul.

[31] In my view, as the issue (as to whether or not the 'Federal Court' panel was lawfully constituted in the light of s 74 of the Courts of Judicature Act 1964 and art 122(2) of the Federal Constitution) was never considered at all by the judgment of Hashim Yusoff J, therefore, the case of *Majlis Peguam v V Kanagalingam* is irrelevant for our purpose, notwithstanding that the appeal of the Bar Council (*Majlis Peguam*) to the Federal Court against the decision of the High Court was dismissed (from the supplementary written submission of the learned counsel of the plaintiff it would appear that the Federal Court in dismissing the Bar Council's appeal did not provide a written judgment).

[32] Therefore, the judgment of the Court of Appeal in the *Ayer Molek* case is still wholly intact and is still a valid and binding judgment and I am entitled — indeed, I am duty bound — to take cognizane of the judgment in deciding on the plaintiff's claim in this section.

Schedule to Judgment

[Article in the 14 November 1995 issue of the *International Commercial Litigation* magazine]

MALAYSIAN JUSTICE ON TRIAL

On April 10 1995, a Malaysian lawyer was granted an *ex parte* order by the country's High Court, compelling a company to register a block of shares owned by his client. The kind of thing that happens all the time.

But this was no routine case. This was different. It ended with Malaysia's supreme court criticizing the country's appeal court in terms which were far from judicial and the president of the Malaysian Bar Council talking of 'very serious questions over the administration of justice in Malaysia'.

The case in question was the *Ayer Molek* case. And it was the culmination of a series of court decisions in commercial cases which cases caused many of Malaysia's leading lawyers to raise doubts about Malaysia's legal system.

'The ultimate fear about Ayer Molek and all of those cases is that they mean Malaysia is going the way of other Asian countries, such as Indonesia, Thailand and the Philippines,' say Raphael Pura, the Malaysia correspondent to the *Asian Wall Street Journal*. 'The implication is that, just like those other countries, Malaysia is becoming a place where justice is now 'up for bid'.'

Until now, Malaysia, which enjoyed economic growth of 9.5% in the first half of 1995, has been able to portray itself as a country largely free from corruption. As a result, the government has succeeded in attracting some of the biggest foreign names in manufacturing. Apple Computers, Citroen, Motorola, General Electric and Hewlett Packard all chose Malaysia as their base when they set up manufacturing operations in Asia.

The court cases to which Pura refers, and which could seriously affect Malaysia's reputation as a major financial centre, have all occurred within the last year. They came to a head in August, when the *Ayer Molek* case provoked a row between the Federal Court and the Court of Appeal, Malaysia's two highest courts. Because of the cases, Malaysians from all walks of life have openly started to question the independence of their judiciary.

On August 28, Puan Hendon, the president of the Malaysia Bar Council, issued a press statement saying the 'differing views and comments' of the two courts raised 'very serious questions over the administration of justice in Malaysia'. In response, Eusoff Chin, Malaysia's most senior judge and the author of the Federal Court judgment which criticized the Court of Appeal, issued a statement saying the Bar Council should have discussed the matter with him privately before they went 'to yell in the press'.

Politicians also became involved. Lim Kit Siang, secretary general to the DAP, Malaysia's largest opposition party, said that there was 'a new crisis of confidence over the judiciary in Malaysia'. Prime Minster Mahathir Mohamad told the Bar Council and Chin on September 7 that their squabble was 'destabilizing' the Malaysian legal system.

The Ayer Molek case

The case of *Insas and Megapolitan Nominees v Ayer Molek Rubber Company* concerned court action brought to force the rectification of Ayer Molek's share register after the M$157 million ($63 million) purchase by Insas and Megapolitan, two related investment houses, of 30% of Ayer Molek's shares in 1994. It produced very sharp criticisms from the Court of Appeal about the conduct of one plaintiff lawyer, VK Lingham of VK Lingham & Co, accusing him of illicit manoeuvring to put the case before a high court judge of his choice.

Even though they had not asked Ayer Molek to register their shares, Insas and Megapolitan went to the High Court on April 10 1995. They informed the judge that they knew from 'reliable sources' that Ayer Molek, if asked, would refuse to register their shares. This was because the company had not registered a separate, 12% block bought by a nominee company, PFA Nominees.

Later affidavits show that Haji Mohd Halmi, the chairman of Ayer Molek, had by the time of the court hearing, become convinced that Insas, Megapolitan, PFA Nominees and Vincent Tan, one of Malaysia's most prominent businessmen, were 'aligned to each other to ensure that both the Insas shares … [and the PFA shares] were registered'. He believed that, by jointly buying 42% of Ayer Molek stock in secret, Insas and PFA had breached Malaysia's takeover code. Consequently, Ayer Molek's board had decided that registration requests from either Insas and Megapolitan, or PFA Nominees would be refused.

The affidavits show that Haji's belief resulted from meetings to which he was invited on March 31 and April 5. Tan, Thong Kok Kei, the chief executive of Insas and a close friend of Tan, and Lingham, counsel to both, were present at each. On both occasions, Haji was requested to 'speed up the registration of the PFA-held Ayer Molek shares.'

In the High Court on April 10, Lingham was granted an *ex parte* order designed to compel Ayer Molek to register the 30% block of shares bought by Insas and Megapolitan. Judge Azmel Mamoor, who sits in the Special Appellate Division of the High Court, made the order. The order, which was served on April 11, directed Ayer Molek's officers to register the shares within 48 hours or face imprisonment.

Ayer Molek applied to have the order revoked on April 13. Azmel agreed to hear their request on April 27 but refused a request to stay the injunction pending that hearing. Ayer Molek reluctantly registered Insas's and Megapolitan's shares on April 14 and took the matter to the Court of Appeal four days later. Ayer Molek was seeking a declaration that the High Court had been unjust and asked the Court of Appeal to reverse the effects of a registration that had been made under duress. The hearing was set for July 26.

At the hearing, the Court of Appeal, saying that it was 'using its inherent power to stop further injustice from occurring', gave Ayer Molek an order to stop Insas and Megapolitan exercising any rights over their shares. Five days later, it delivered its written judgment on Ayer Molek's appeal. It called the situation produced by the High Court's treatment of the case 'an injustice perpetrated by a court of law.'

The Court of Appeal also strongly criticized Lingham for taking a commercial matter, the registration of shares, to a division of the High Court which should only deal with administrative law cases. It called him an 'unethical lawyer' and said that his conduct would give 'right-minded people the impression that some litigants are able to choose the judge before whom they wish to appear'. Insas and Megapolitan appealed to the Federal Court, Malaysia's highest court, which held a hearing on August 1.

The Federal Court overturned the Court of Appeal's judgment and censured the lower court for its comments. In a August 12 judgment, it accused the Court of Appeal of itself 'bringing the administration of justice into disrepute' by 'departing from sobriety' and 'going off on a frolic of its own'. The Federal Court said that, by discontinuing the High Court action, Ayer Molek could 'be deemed to have conceded the *ex parte* order'. It expunged the sections of the Court of Appeal's judgment which criticized Lingham.

On September 8, the share sales to Insas and Megapolitan, and PFA Nominees, were finally cancelled and police investigations into the whole affair ceased. All law suits were withdrawn a week later.

Something Rotten

Although the Federal Court overturned the lower court's decision, the Court of Appeal's comments brought the *Ayer Molek* case to the attention of the rest of Malaysia's legal

profession. One lawyer notes: 'The Court of Appeal made it clear that it thought something funny had been going on in the High Court in that case. That was why they put in a Shakespeare quote about there being 'something rotten in the State of Denmark'. It was a reference to the building the High Court is in, which is called Denmark House.'

Tommy Thomas of Skrine and Co would like to know how Lingham managed to 'overcome two hurdles that are supposed to make it impossible for this misfiling to happen. First, you have to get the registry to admit the case in the wrong division. Then you have to persuade the judge himself to let it stay. The fact that the judge agreed to entertain this case really is a surprise'.

Another lawyer says: 'Lingham's action was like filing a commercial matter in the family court. It should have made him look incredibly stupid. But, of course, it turned out that it went super well.'

Yet another lawyer found the terms of the *ex parte order* that Lingham obtained highly irregular: 'First, it is literally unheard of to be given a compulsion order which forces a company to register your shares except where you have tried everything else and it is your last resort. Here, Insas and Megapolitan, the two shareholders, who had not done anything at all about their shares for six months, suddenly were able to go to court and use this last resort compulsion procedure. What I do not understand is how they could get a judge to threaten Ayer Molek with contempt of court before Ayer Molek had actually refused to do anything.'

Another says: 'At Lingham's request, this judge even added mandatory imprisonment to the *ex parte* order. And then he refused to hear Ayer Molek's case for two weeks or to suspend the order, although such orders only have life-span of two weeks.'

Privileged scheduling

There are various aspects of the way that the Federal Court dealt with Ayer Molek that also concern Malaysia's lawyers. 'The case made it into the Federal Court at a startling speed,' says one. 'I am appealing the same sort of order at the moment. I expect that to get it into the Federal Court will take at least six months. In *Ayer Molek*, it took Lingham four days.'

That sort of privileged scheduling, says Tommy Thomas, is usually preserved for emergency situations: 'In the textbooks, the example of an emergency situation they give is where a bulldozer is already outside your home ready to start knocking it down. You should not be able to get an expedited appeal in a case about shares.'

Other lawyers feel the tone of the Federal Court judgment, which was delivered on August 12 by Chief Justice Eusoff, and especially its criticisms of the Court of Appeal, are too personal. One says that, in the *Ayer Molek* judgment, Eusoff makes several departures from his established style writing: 'Eusoff certainly has an identifiable style to his judgments, which, after all, we have been reading now since 1982, when he first became a judge. Normally, and unlike here, he writes in a very staccato form, using short sentences and without making many references to other cases as authorities. He certainly doesn't quote big chunks of text from other cases in the way that he did in this case. At least a quarter of this judgment was taken up with quotes from other cases. Normally it would be at most a couple of carefully chosen, very brief quotes, if a point needs to be made clear.'

'The lawyer also points out that the judgment was written in the 11 days between August 12, when the judgment was delivered, and the hearing on August 1. 'My own experience,' he says, 'is that it takes the Federal Court at least 21 to 30 days to produce a judgment.'

K Anantham of Skrine & Co says the Federal Court's decision to expunge parts of the Court of Appeal's judgment was fortuitous for Lingham: 'The Bar Council was going to order

Lingham to account for his behaviour in *Ayer Molek*, using the Court of Appeal's comments about him as basis, if necessary, on which to discipline him. But then, on the basis of an Indian authority which Lingham had found, the Federal Court expunged the important sections of the Court of Appeal's judgment, cutting the ground from under the Bar Council's feet.'

More Concerns

In the aftermath of *Ayer Molek*, concerns about Lingham's tactics have arisen again. This time in the dispute between the Malaysia Borneo Finance Holdings (MBFH) and the East Asiatic Company (EAC). Again, there were a number of procedural peculiarities which lead Param Cumuraswamy, United Nations Special Rapporteur on the Independence of Judges and Lawyers, to say that the case looks like 'a very obvious, perhaps even glaring, example of judge-choosing', although he stresses that he has not finished his investigation.

This case concerned a claim for breach of contract for the sale of land. The land was bought from EAC on March 8 1995 by MBfH. The cost was M$115 million ($46 million), paid for by 72,424,058 MBfH shares. A second agreement prevented EAC from selling the shares before August 31, and he gave three MBfH subsidiaries the right to arrange any sale once one was allowed.

On may 6 MBfH started an action in the Civil Division of the High Court, alleging EAC had broken its contract by not providing vacant possession of the land. Delays in the High Court meant the main trial could not be heard for at least six months, and so MBfH applied for a pre-trial injunction to stop EAC from selling the shares after August 31.

A hearing on MBfH's application took place in front of Judge Vohrah on June 21 and he later said that he would announce his decision on August 23.

But, on August 11, the subsidiaries, represented by Lingham, also started court proceedings against EAC, aimed at stopping EAC from selling the shares after August 31. They issued an Originating Summons in Court No 5 of the Commercial Division of the High Court (Judge Malek), seeking a declaration that EAC's shares were 'encumbered by the dispute between MBfH and EAC'. The following day, the subsidiaries started a second, identical, set of proceedings against EAC in Court No 2 of the Commercial Division (Judge Low Hop Bing).

On August 14, the Court No 2 proceedings were served on EAC. On the same day, the subsidiaries filed an *ex parte* notice of discontinuance of their Court No 5 proceedings.

EAC responded by filing two identical consolidation applications in Vohrah's and Low Hop's courts, requesting that the subsidiaries' action be added to the first action before Vohrah. At this point, Cheang and Ariff stepped down as MBfH's lawyers, to be replaced by T H Su & Co.

Low Hop Bing held a hearing on the consolidation application on August 18. He granted EAC's request to adjourn the matter until after Vohrah's August 23 decision. Vohrah also held a hearing on the consolidation request and asked Lingham why the first proceedings he had started (in Court No 5) has been discontinued. This was the first EAC knew of the discontinued proceedings. Lingham replied that the Court No 5 summons was withdrawn 'because it had typing mistakes'.

On August 23, Vohrah rejected MBfH's injunction application and, the following day, asked in any party objected to his hearing both cases. Only Lingham did, insisting that the subsidiaries' case should remain before Low Hop Bing. Vohrah then discharged himself from the main trial and instructed the parties to consult Judge Azmel Mamoor, Chief Judge of the High Court, on how they should proceed. Azmel said that they should talk to Chief

Justice Eusoff. An hour after Vohrah's hearing, Low Hop Bing threw out EAC's consolidation request, announcing that the subsidiaries' case would remain before him.

After Eusoff informed the parties on August 25 that he could not see them until September 6, the dispute was settled. The shares were sold on August 30 for M$115 million.

Procedural gymnastics

Tommy Thomas, who acted for EAC, says that the 'procedural gymnastics' in which the subsidiaries engaged during that dispute 'raise questions that cry for answers'. A lawyer close to Cheang & Ariff says that the firm stepped down because 'it disagreed with what was being done by the legal team working for the subsidiaries'.

Thomas points to the sequence of the two identical legal actions started in two different courts, one of which was then discontinued, as proof that the subsidiaries were trying to get their case before one particular judge, namely Judge Low Hop Bing: 'Lingham told Judge Vohrah on August 19 that the action they had started in Court No 5, on August 11, had to be withdrawn on August 14 because of typing error. That simply cannot be right. If you compare the main document from Court No 5, which is supposed to have contained so many typing errors that it had to be withdrawn, with the main document put into Court No 2 (Low Hop Bing's court), you will see that they are absolutely no differences between them. And they are only two inconsequential differences between the supporting affidavits.'

'The irresistible inference,' Thomas says, 'has to be that they wanted Low Hop Bing, and only Low Hop Bing, to hear their case. When everyone else involved agreed that all the actions should be brought together in Judge Vohrah's court, it was Lingham who insisted the subsidiaries' case should stay with Low Hop Bing'.

VK Lingham

The Malaysian Bar Council's record shows that Lingham qualified in 1988. Since then, according to Thomas, Lingham has built up 'a small portfolio' of clients, all of whom 'are incredibly rich and very loyal to him, mainly Malaysian entrepreneurs'.

So is it possible that speculation surrounding these and others of Lingham's most recent cases could be a case of sour grapes? A few defeated opponents saving face by using their seniority to make mischief for him?

One member of the Bar Council rules this out: 'The people Lingham has been up against recently are all very senior counsel and have no need to indulge in such sour grapes. People like Tommy Thomas and Loh Siew Cheang of Cheang & Ariff have been around for many years and are from locally renowned firms. Their reputations are already absolutely assured. They are hardly people who would feel that they had somehow lost their credibility as advocates because of these cases.'

'Besides,' he adds, 'I do not think these cases were ever really allowed to get to the meat of the dispute. So they never became about Lingham bettering any of his opponents in open argument before the court. The cases have all tended to finish immediately after the pre-trial stage. They were all about procedure and manoeuvring'.

VK Lingham declined to comment on the question raised by these two decisions and those described below.

Terrible situation

The people who are most concerned about the implications of these recent cases are Malaysia's 5,500 lawyers. 'The present situation is terrible,' says Thomas, 'one hears all sorts of gossip'.

Another senior lawyer, who prefers not to be named, agrees there is a new feeling around the profession. 'People are very disheartened and disillusioned,' he says. 'There is a general feeling that *Ayer Molek* should not have happened the way that it did. In particular, people felt that, for some reason, in that case the Federal Court was choosing deliberately to be very unfair.'

And, according to this lawyer, Malaysian lawyers, bewildered by the many unusual aspects to these decisions, have found that they are faced with two equally unappetizing conclusions: ' Because no one understands these decisions, people have really had to start questioning both the intellectual capacity of our courts and the integrity of our judges.' Tommy Thomas says that many Malaysian lawyers have already decided which of those explanations they believe.

Economic consequences

The danger is that, if these perceptions continue and become more widely held, they could damage Malaysia's good standing in the eyes of foreign investors. An economist from one of the international banks which has offices in Malaysia is not sure if the affair has started to alter perceptions of the country. It is, he says, 'one of those intangible issues. It depends on the groundswell of opinion. At the moment I don't think any general opinion about Malaysia being corrupt has started to crystallize'.

According to the economist, those crucial foreign manufacturers like Malaysia for a number of reasons: 'Land has been well priced and the Malaysian government has always been very pro-foreigners. So it has allowed them to own the bulk of their own plants. Partly it is also because the English language is widely spoken, and there is a surplus of skilled labour in the market.'

But, and this is more important in the light of the new mood of gloom around Malaysia's court, the economist thinks that company faith in Malaysia has 'a lot to do with Malaysia's UK-derived tradition of a good legal framework'. Especially as, he points out, setting up operations in a new country is a process often fraught with 'disputes and teething problems'.

So it would because for concern to those in the higher levels of Malaysian public life if the country's justice system had indeed started to go the way of its Asian neighbours. And there is evidence that, in the wake of these legal problems, Malaysian-based companies are beginning to lose faith in the Malaysian courts.

Param Cumuraswamy, who has a global mandate from the United Nations to investigate complaints such as those circulating in Malaysia at present, reports that he has received enquiries about Malaysia from foreign businessmen. Originally a counsel at the Malaysian law firm of Shook Lin & Bok, he says: 'It would be unfair to name any names, but there is some concern about all this among foreign businessmen based in Malaysia, particularly among those who have litigation pending.'

Another senior Malaysian attorney has also witnessed this growing concern. 'There is a general concern among foreign clients about the civil justice system,' he says. 'The first question that those clients ask me now is 'how safe are the Malaysian courts?' I know several people whose multinational clients have been asking them questions specifically about the *Ayer Molek* case.'

There was no sign of these concerns at the beginning of 1995, when the World Economic Forum, a Geneva-based business consultancy, researched its World Competitiveness Report. It was published in September. As part of the research, major companies were asked what level of confidence they had in the justice system of the country in which they were located. On the basis of the 59 Malaysian replies it received between January and April, the World Economic Forum ranked Malaysia as one of the top 25 systems in the world, and placed it above both the US and United Kingdom.

Cumuraswamy thinks Malaysia would not be able to repeat that result at present. 'Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice,' he says. 'But I do not want any of the people involved to think I have yet made up my mind.'

The Tan libel case

Cumuraswamy says that, although these complaints 'only really came to prominence because of the judge-choosing allegations in the *Ayer Molek* affairs, people first started to question the integrity of the judiciary after the M$10 million ($4 million) libel award which Vincent Tan received on October 22 last year.'

Tan is the head of the Berjaya Group, one of Malaysia's largest companies, which has diverse business interests ranging from gaming venues, to shopping malls, leisure resorts and telecommunications. An economist at one of the international banks based in Malaysia described Tan as 'the archetypal business autocrat, completely inseparable from his company. Tan is the major stockholder in, and the driving force behind, the company. He goes out and gets the contracts, and hires and fires the staff'.

Tan sued over four articles published in the August and October 1993 issue of *Malaysian Industry*, a business magazine. The M$10 million damages he received was the highest ever awarded by a Malaysian court. 'The Tan libel case struck people as unusual,' says Raphael Pura, 'because of the speed with which the case went from start to finish. Suddenly, a case which would typically take about four years to get a court date, was heard within six months. The trial itself, which normally would take about 12 months to get court, was in and out in three days.'

A Malaysian lawyer agrees that the speed of the case raised eyebrows. 'People instantly wondered what was so special about the Tan libel case that the courts wanted to deal with it so speedily,' he says.

But others say it was the size of the award, which made them curious. 'M$10 million dollars is a big award for a libel case by any country's standards. But, by Malaysian standards, it is a hell of lot,' says Pura. 'No one in Malaysia had won anything like it before. The most previously had been about half a million Malaysian dollars.' He adds that, at the outset, few had thought Tan's case looked strong: 'The core of the article was not a particularly outrageous reference to money-politics. Tan leapt on it and tried to put the worst possible meaning on it, one that perhaps wasn't possible meaning on it, one that perhaps wasn't justified.' VK Lingham acted for Tan in the case

Defying the odds

According to one economist, one of Tan's companies, Berjaya Industrial, has also recently 'appeared to defy the odds' in a Malaysian court. On May 13, Berjaya Industrial won an injunction in the High Court of Malaysia that prevented a M$500 million dispute over derivatives from being relocated to the United Kingdom. Berjaya Industrial was suing CS First Boston for negligent misrepresentation after the Malaysian company lost heavily in an interest rates swap deal.

The economist at the Malaysian branch of an international bank says: 'From what I heard about the case, it should have been quite cut and dried. Berjaya basically ducked out. Tan later sacked the guy who signed Berjaya up for it. Locally the view was that that was a bit strange too. He seemed to be too junior a person to have committed the company to such a huge position. The Malaysian judge, Chief Judge Malek, said that it was a Malaysian deal so the dispute should be heard by a Malaysian court.'

Tommy Thomas of Skrine & Co believes that the decision looks incorrect: 'It was an offshore deal done under UK law, so the UK seemed like it was the proper forum for the

dispute.' CS First Boston and Berjaya settled the dispute on October 12. Both agreed not to apply for any costs. VK Lingham acted for Berjaya Industrial.

Behind Closed Doors

Cumuraswamy stresses that the public feud that erupted between Chief Justice Eusoff Chin and the Bar Council over *Ayer Molek* appears to have been resolved: 'The Bar Council and the Chief Justice have met and I have heard that some positive steps are being taken to improve the system.'

But some of Malaysia's disheartened lawyers already think they know how it will feel if the system does not improve. One says: 'At the end of the day we all just want the system to be fair. You want it to be one where you are able to walk out of a case and say lightheartedly. 'The judge was a fool', without being worried that it could actually be true.'

He concludes: 'What people are really worried about is that one day it might be them who has to leave court without having any real idea what just happened. Whether it was they who never understand the law; whether it was the judge who misunderstood the law; or whether something terrible had been arranged in advance behind closed doors.'

[Suit Dismissed]

Plaintiff's claim dismissed.

Reported by Sally Kee